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In the Supreme Court of the United States

October Term, 1983

ROBERT C. BACON, CHARLES BUSSING, MARTHA MASINGTON, LARRY PLAGGERMAN, CLYDE A. TOWNSEND AND ALL PERSONS SIMILARLY SITUATED,

Appellants,

vs.

JOHN CARLIN, GOVERNOR OF THE STATE OF KANSAS; JACK H. BRIER, SECRETARY OF STATE, OF THE STATE OF KANSAS; ROSS O. DOYEN, PRESIDENT OF THE KANSAS SENATE; MIKE HAYDEN, SPEAKER OF THE KANSAS HOUSE OF REPRESENTATIVES; DAN THIESSEN, CHAIRMAN OF THE KANSAS SENATE COMMITTEE ON LEGISLATIVE AND CONGRESSIONAL APPORTIONMENT; AND EDGAR MOORE, CHAIRMAN OF THE KANSAS HOUSE COMMITTEE ON LEGISLATIVE AND CONGRESSIONAL APPORTIONMENT,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
DISTRICT OF KANSAS

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Appellants appeal from the final judgment of a three-judge panel of the United States District Court, District of Kansas, dated December 21, 1983, and pray that an order be entered noting probable jurisdiction of the appeal.

QUESTIONS PRESENTED

The threshold question before the Court is whether a state legislature which validly reapportioned its legislative districts gains a ten-year "safe harbor" protecting it from further reapportionment no matter what factual or statutory changes occur.

The ultimate question is whether the present legislative apportionment and the plan of reapportionment of Kansas legislative districts violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

PARTIES BELOW

The only parties to this proceeding in the court below are those indicated by the caption of this jurisdictional statement.

TABLE OF CONTENTS

Jurisdictional Statement I
Questions Presented I
Parties Below I
Table of Authorities III
Opinion Below 1
Jurisdictional Statement 2
Constitutional Provisions and Statutes Involved 3
Statement of the Case 6
The Questions Are Substantial 9

I. The Court Below Erred in Holding That Kansas Is Not Constitutionally Compelled to Reapportion Its Legislative Districts at This Time 9

II. The Current Kansas Legislative Districting Scheme Contains Impermissibly Large Population Variances and Violates the One Person, One Vote Principle of the Fourteenth Amendment to the United States Constitution 17

Conclusion 21

Appendix—

Opinion of District Court A-1
Notice of Appeal A-10
Exhibits E and F to Stipulated Facts ..... A-13 to A-18
Plaintiffs' Motion for Summary Judgment A-19

TABLE OF AUTHORITIES

Cases

Bacon, et al. v. Carlin, et al., 575 F. Supp. 763 (D. Kan. 1983) 1, 9, 16, 17
Brown v. Thomson, ... U.S. ....., 103 S.Ct. 2690, 77 L.Ed. 2d 214, 228 (1983) 18
Connor v. Finch, 431 U.S. 407 (1977) 18, 19
Farnum v. Burns, 548 F. Supp. 769 (D. R.I. 1982) 14, 15
Flateau v. Anderson, et al., 537 F. Supp. 257 (S.D. N.Y. 1982), appeal dismissed, ... U.S. ....., 73 L.Ed. 2d 394, 103 S.Ct. 5 (1983) 14, 20
Gaffney v. Cummings, 412 U.S. 735 (1973) 18, 19
Honsey v. Donovan, 236 F. Supp. 8 (D. Minn. 1964) 15
In re House Bill No. 2620, 225 Kan. 827, 595 P.2d 334 (1979) 6
In re Senate Bill No. 220, 225 Kan. 628, 593 P.2d 1 (1979) 6
Mahan v. Howell, 410 U.S. 315 (1973) 18, 19
Reynolds v. Sims, 377 U.S. 533 (1964) ..... *passim*
Sixty-Seventh Minnesota State Senate v. Beens, 406 U.S. 187 (1972) (per curiam) 15
Whitcomb v. Chavis, 403 U.S. 124 (1971) 15, 16

Constitutional Provisions

Article 10, Section 1 of the Kansas Constitution 3
Section 1 of the Fourteenth Amendment of the Constitution of the United States 3

Statutes

K.S.A. 11-201 ..... 4, 6

No.

In the Supreme Court of the United States

October Term, 1983

ROBERT C. BACON, CHARLES BUSSING, MARTHA MASINGTON, LARRY PLAGGERMAN, CLYDE A. TOWNSEND AND ALL PERSONS SIMILARLY SITUATED,

Appellants,

vs.

JOHN CARLIN, GOVERNOR OF THE STATE OF KANSAS; JACK H. BRIER, SECRETARY OF STATE, OF THE STATE OF KANSAS; ROSS O. DOYEN, PRESIDENT OF THE KANSAS SENATE; MIKE HAYDEN, SPEAKER OF THE KANSAS HOUSE OF REPRESENTATIVES; DAN THIESSEN, CHAIRMAN OF THE KANSAS SENATE COMMITTEE ON LEGISLATIVE AND CONGRESSIONAL APPORTIONMENT; AND EDGAR MOORE, CHAIRMAN OF THE KANSAS HOUSE COMMITTEE ON LEGISLATIVE AND CONGRESSIONAL APPORTIONMENT,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
DISTRICT OF KANSAS

JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the three-judge panel of the United States District Court for the District of Kansas (Appendix A-1) is reported at 575 F. Supp. 763 (D. Kan. 1983).

JURISDICTION

This appeal arises from an action challenging the constitutionality of the present apportionment scheme of the Kansas legislature. A three-judge panel of the U.S. District Court for the District of Kansas was convened pursuant to 28 U.S.C. § 2284(a). The judgment of the panel was entered December 21, 1983. It held that Kansas was not constitutionally compelled to reapportion its legislature at this time. A timely notice of appeal was filed on January 20, 1984, in the United States District Court for the District of Kansas. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. § 1253.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Section 1 of the Fourteenth Amendment of the Constitution of the United States provides as follows:

> "Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article 10, Section 1 of the Kansas Constitution, as amended in 1974, is found in the Kansas Statutes Annotated and contains the legislative reapportionment procedure for Kansas. The section states in full:

> "(a) At its regular session in 1979, and at its regular session every tenth year thereafter, the legislature shall enact a statute reapportioning the state senatorial districts and representative districts. Bills reapportioning legislative districts shall be published in the official state paper immediately upon final passage and shall be effective for the next following election of legislators and thereafter until again reapportioned.
>
> (b) Within fifteen days after the publication of an act reapportioning the legislative districts within the time specified in (a), the attorney general shall petition the supreme court of the state to determine the validity thereof. The supreme court, within thirty

days from the filing of the petition, shall enter its judgment. Should the supreme court determine that the reapportionment statute is invalid, the legislature shall enact a statute of reapportionment conforming to the judgment of the supreme court within fifteen days.

(c) Upon enactment of a reapportionment to conform with a judgment under (b), the attorney general shall apply to the supreme court of the state to determine the validity thereof. The supreme court, within ten (10) days from the filing of such application, shall enter its judgment. Should the supreme court determine that the reapportionment statute is invalid, the legislature shall again enact a statute reapportioning the legislative districts in compliance with the direction of and conforming to the mandate of the supreme court within fifteen (15) days after entry thereof.

(d) Whenever a petition or application is filed under this section, the supreme court, in accordance with its rules, shall permit interested persons to present their views.

(e) A judgment of the supreme court of the state determining a reapportionment to be valid shall be final until the legislative districts are again reapportioned in accordance herewith."

K.S.A. 11-201 states:

(a) Except as otherwise provided in subsection (b), the most recent population figures available from the United States bureau of the census as certified to the secretary of state by the division of the budget on July 1 of each year shall be used for all purposes in the application of the statutes of this state. When-

ever the use of the population figures or the census of the state board of agriculture is referred to or designnated by a statute, such reference or designation shall be deemed to mean the population figures certified to the secretary of state pursuant to this section. The city and county population figures certified to the secretary of state pursuant to this section shall be distributed by the division of the budget to the cities and counties of the state and to such other governmental entities as the division deems appropriate and shall be made available by the division upon request of any other person.

The population figures certified to the secretary of state pursuant to this section shall be disposed of in accordance with K.S.A. 75-3501 et seq.

(b) On July 1 of each year, the division of the budget shall distribute to the treasurer of each county a table showing the total population of the county, the total population of the county residing outside the boundaries of any incorporated city and the population of each incorporated city within the county, using the most recent information which is available from the United States bureau of the census and which provides actual or estimated population figures for both cities and counties as of the same date. The county treasurer shall use the table as the basis for apportioning revenue from any countywide retailers' sales tax pursuant to K.S.A. 12-192 and amendments thereto.

STATEMENT OF THE CASE

The parties submitted this case to the three-judge panel below on stipulated facts.

Appellants are all registered voters of the State of Kansas and have brought this suit on behalf of themselves and all others similarly situated. Appellees are all officials of the State of Kansas or elected representatives to the Kansas legislature and were sued in their official capacities.

The State of Kansas had, until 1978, conducted an annual State of Kansas Agricultural Census. In 1978, the statutes authorizing the state census were repealed by the legislature. The legislature subsequently enacted K.S.A. 11-201, which requires the federal census figures to be used for all purposes in application of the statutes of this state. K.S.A. 11-201(a). In 1979, pursuant to Article 10, Section 1 of the Kansas Constitution, the Kansas legislature reapportioned both legislative bodies based on the 1978 State of Kansas Agricultural Census. The constitutionality of the 1979 reapportionment was upheld by the Kansas Supreme Court in *In re Senate Bill No. 220,* 225 Kan. 628, 593 P.2d 1 (1979), and in *In re House Bill No. 2620,* 225 Kan. 827, 595 P.2d 334 (1979). The constitutionality of the State of Kansas Agricultural Census used in the 1979 reapportionment is not challenged in this case and apparently was not an issue in the cases before the Kansas Supreme Court.

In 1980 the decennial census of the United States was conducted. On December 31, 1980 (as revised February 18, 1982), the total population of the State of Kansas of 2,364,236 was officially certified to the President of the

United States. Presently, the Kansas House of Representatives contains 125 members, and the Kansas Senate contains 40 members. Ideally, under the 1980 census the population of a state representative's district would be 18,914, and the population of a Senate district would be 49,106. According to reports from the Kansas Legislative Research Department (Exhibits E and F to the Stipulated Facts in the record of the court below, set forth at Appendix A-13 to A-18 herein), the population of sixteen Senate districts deviates from the ideal by more than 5% (plus or minus), with District 22 being 43.6% higher than the ideal and District 39 being 14.3% under the ideal. The population of seventy House of Representatives districts varies from the ideal more than 5% (plus or minus), with District No. 113 being 19.62% less than ideal, District 42 being 40.70% more than ideal, District 64 being 30.36% more than ideal, District 66 being 80.63% more than ideal and District 67 being 36.93% more than ideal.

The maximum total deviation from the ideal Senate district population is 57.9% and the maximum deviation from the ideal House of Representatives district population is 100.41%.

Under existing Kansas law, elections for state Senate seats are held every four years. Under the existing legislative reapportionment plan, the 1978 State of Kansas Agricultural Census served as the basis for Senate districts in the 1980 election and, unless changed, will also serve as the basis for the 1984 and 1988 elections. State Representative elections are held every two years. Under the existing reapportionment plan, the 1978 State of Kansas Agricultural Census served as the basis for House districts in the 1980 and 1982 elections and, unless changed, will also serve as the basis for the 1984, 1986 and 1988 elections.

In the 1983 legislative session, the Kansas Senate adopted Senate Resolution 1814, which authorized the Senate Committee on Legislative and Congressional Apportionment to study the need for reapportionment in light of the 1980 census results. The Committee met and considered an opinion of the Attorney General of the State of Kansas which stated that the Kansas Constitution prohibited legislative reapportionment until 1989, although in 1989 constitutional problems could arise with the current plan. On June 3, 1983, the legislature adjourned without taking action.

On August 5, 1983, appellants filed this action requesting the convening of a three-judge court and requesting such court to declare the Kansas Senate and House of Representatives districts in violation of the Fourteenth Amendment to the Constitution of the United States and seeking immediate injunctive relief. A three-judge panel was convened pursuant to 28 U.S.C. § 2284(a).

The appellees, defendants below, filed a motion to dismiss which the court treated as a motion for summary judgment pursuant to the agreement of the parties. The appellants, plaintiffs below, filed a cross-motion for summary judgment on stipulated facts (Appendix A-19). The parties submitted written briefs and presented oral arguments to the panel, and the court entered its order December 21, 1983, in which it denied plaintiffs' prayers for relief and held that Kansas was not constitutionally required to reapportion at this time. The court below rejected plaintiffs' claims of a violation of their constitutional right to equal protection of the laws and held that once validly enacted a state apportionment plan was not subject to constitutional challenge for ten years. After reviewing several cases in the area, the court stated:

> "What [the cases] tell us is that in 1989, if the Kansas legislature attempts to implement its constitutional provision requiring reapportionment by reliance upon 1980 federal census figures or those figures updated by estimates, constitutional problems will arise." *Bacon, et al. v. Carlin, et al.*, 575 F. Supp. 763, 766 (1983).

The court concluded that the 1978 data upon which the current Kansas scheme is based met the "decennial reapportionment" requirement of the Constitution as stated in *Reynolds v. Sims*, 377 U.S. 533, 583-84 (1964).

THE QUESTIONS ARE SUBSTANTIAL

I. The Court Below Erred in Holding That Kansas Is Not Constitutionally Compelled to Reapportion Its Legislative Districts at This Time.

The three-judge panel noted that the question of whether a reapportionment scheme that was less than ten years old could be subject to a challenge on equal protection grounds if it was constitutional when enacted was "a novel one". *Bacon*, 575 F. Supp. at 765. The determination of whether a ten-year "safe harbor" exists for apportionment schemes has never been made by this Court. The court below created a ten-year reapportionment "safe harbor" from language in *Reynolds v. Sims*, 377 U.S. 533 (1964), and by "distinguishing" all cases suggesting the contrary. Neither *Reynolds* nor its progeny require or suggest such a result, and it is imperative that this Court determine this issue.

This Court has set forth the standards for state legislative reapportionment.

> "Whatever the means of accomplishment, the overriding objective must be substantial equality of popu-

lation among the various districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen in the State." *Reynolds*, 377 U.S. at 579.

In *Reynolds*, this Court concluded that decennial reapportionment was a "rational approach" to handle population shifts and growth, "although undoubtedly reapportioning no more frequently than every ten years leads to some imbalance in the population of districts *toward the end of the decennial period* . . ." *Id.* at 583. (emphasis added). The Equal Protection Clause does not require "daily, monthly, annual or biennial reapportionment *so long as a State has a reasonably conceived plan for periodic readjustment of legislative representation*" *Id.* (emphasis added). In this case the court below ignored the requirement of a "reasonably conceived plan for periodic readjustment" and concluded that since the data upon which the districts were drawn was less than ten years old, the one person, one vote principle could not mandate reapportionment. The three-judge panel below created, in effect, a "safe harbor" period of ten years for state legislative schemes. If a districting plan is less than ten years old, it may not be challenged under the panel's categorical rule, no matter what intervening events may have occurred. The panel concluded that "in 1989, if the Kansas legislature attempts to implement its constitutional provision requiring reapportionment by reliance upon 1980 federal census figures or those figures updated by estimates, constitutional problems will arise." *Bacon*, 575 F. Supp. at 766. It is clear that Kansas has *no* reasonably conceived plan for periodic reapportionment, and that the population deviations now existing require legislative reapportionment sooner than the ten-year span ordinarily approved. This Court has never proclaimed the inviolate nature of apportionment schemes less than ten years old. The language

in *Reynolds* approving the use of decennial apportionment is clearly conditional upon the existence of a rational state plan.

An examination of the Kansas reapportionment scheme reveals one of the most irrational, unsupportable reapportionment plans that could be devised.

The current legal provisions for reapportionment in Kansas provide for reapportionment one year *before* the decennial census is taken by the U.S. Bureau of the Census based on data gathered nine years before. The rippling effect of this delay is amply evidenced by the following illustrations: (1) Elections for state Senate seats are held every four years. The 1978 version of the now repealed State of Kansas Agricultural Census served as the basis for Senate districts in the 1980 election and also will serve as the basis for the 1984 and 1988 elections. Those senators elected in the 1988 election will serve until 1992, although the Senate will be reapportioned in 1989 using the 1980 federal census. The 1980 federal census will serve as the basis for Senate districts drawn in 1989 for state senators elected in 1992 and 1996. Thus, those senators elected in 1996 will serve until the year 2000, representing districts drawn using 1980 census data. This data already shows a maximum deviation of 57.9% in the Senate districts. (2) Elections for the state House of Representatives are held every two years. The 1978 State of Kansas Agricultural Census served as the basis for House districts in the 1980 and 1982 elections and also will serve as the basis for the 1984, 1986 and 1988 elections. Those representatives elected in the 1988 election will serve until 1990, although the House will be reapportioned in 1989 using the 1980 federal census. The 1980 federal census will serve as the basis for House districts drawn in 1989 for state representatives elected in 1990, 1992, 1994, 1996

and 1998. Thus, those representatives elected in 1998 will serve until the year 2000, representing districts drawn using 1980 census data. This data already shows a maximum deviation of 100.41% in the House of Representatives districts.

APPELLANTS REPEAT: the end result is that State senators and representatives will serve until the year 2000 based on districts drawn using the 1980 federal census. When the actual reapportionment plan is superimposed on the numerical deviations in population already existing, it becomes apparent that no "safe harbor" of five additional years can be allowed. Appellants submit that *Reynolds* does not require or suggest such a result.

In *Reynolds*, this Court entertained a challenge to the Alabama state legislative apportionment plan. The district court had held the Alabama apportionment unconstitutional and had enjoined the state officials from conducting future elections under that plan. In *Reynolds*, this Court determined the basic standards and applicable guidelines for implementing the rule of "one person, one vote" in state legislative reapportionment cases.

The Court reaffirmed the basic principle of the earlier congressional reapportionment cases that voters within a state were equal and could not be classified constitutionally on the basis of residence:

> "[T]he fundamental principle of representative government in this country is one of equal representation for equal numbers of people, without regard to race, sex, economic status, or place of residence within a state." *Reynolds*, 377 U.S. at 560-61.

The Court held the Equal Protection Clause of the Fourteenth Amendment required as a "basic constitutional standard" that the seats in both houses of a state legis-

lature must be apportioned on the basis of population. *Id.* at 568. Amplifying this holding, the Court stated:

> By holding that as a federal constitutional requisite both houses of a state legislature must be apportioned on a population basis, we mean that the Equal Protection Clause requires that a state make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal-population as is practicable. We realize that it is a practical impossibility to arrange legislative districts so that each one has an identical number of residents, or citizens, or voters. Mathematical exactness or precision is hardly a workable constitutional requirement. *Id.* at 577.

The Court noted that a state may have valid interests to protect that may result in minor deviations from the goal of equality but warned that even a clearly rational state policy would not justify submerging *population* as the controlling consideration in apportionment. *Id.* at 581. The Court further noted that decennial reapportionment was a rational method to readjust legislative apportionment in light of population shifts within the state. Although decennial reapportionment would lead to "some imbalance" in district population toward the end of the decennial period, this Court concluded that "*so long as a state has a reasonably conceived plan* for periodic readjustment of legislative representation," the Equal Protection Clause does not require "daily, monthly, annual or biennial reapportionment." *Id.* at 583. (emphasis added). Reapportionment accomplished less frequently than every ten years "would *assuredly* be constitutionally suspect." *Id.* at 584. (emphasis added).

In applying the standards generally enunciated in *Reynolds*, several courts have ordered reapportionment

where the state plan was less than ten years old. In *Flateau v. Anderson, et al.*, 537 F. Supp. 257 (S.D. N.Y. 1982), appeal dismissed, ... U.S. ....., 73 L.Ed. 2d 394, 103 S.Ct. 5 (1983), the three-judge panel defined the issue before it to be "whether State legislative elections may be held where the legislative districts are concededly malapportioned, if the state concerned has a constitutional provision which in time will require a correction of malapportionment." *Id.* at 263. Both *Flateau* and the instant case involve state constitutional schemes that provide for periodic reapportionment and challenges to the apportionment before the period has expired. In *Flateau*, the New York legislature had been reapportioned in 1972, with amendments in 1974, based on 1970 census figures. The three-judge panel ordered the state legislature reapportioned in 1982, less than ten years after the most recent changes to the districting scheme and four years prior to the time the state constitution would have required reapportionment. (The three-judge panel in the instant case distinguished *Flateau* on the basis that the data used in the previous reapportionment was older than ten years.) The *Flateau* panel found nothing in *Reynolds* to support the view that if a scheme is less than ten years old it is inviolate.

Farnum v. Burns, 548 F. Supp. 769 (D. R.I. 1982), offers further support to appellants' request for relief. *Farnum* involved a challenge to the 1974 Rhode Island apportionment scheme by plaintiffs who argued that the 1980 census rendered the then-current apportionment unconstitutional under the Fourteenth Amendment. The maximum deviation in the senate districts was 88%. The court rejected the argument that despite the population shifts brought to the attention of the defendants by the 1980 census, Rhode Island was not compelled to reapportion until 1984 under *Reynolds*.

> "The language in *Reynolds* cannot possibly mean that, for purposes of the 1982 elections Rhode Island is free to ignore the results of the 1980 census and can constitutionally use patently malapportioned Senatorial Districts. The right to an equal vote and to equal representation is too important to permit a state such freedom. Furthermore, subsequent opinions of the Supreme Court indicate that a state can constitutionally be compelled to reapportion in time for the first election after a census, even where the existing reapportionment scheme is less than ten years old." *Farnum*, 548 F. Supp. at 773.

In *Honsey v. Donovan*, 236 F. Supp. 8 (D. Minn. 1964), the three-judge panel held in 1964 that an apportionment scheme enacted in 1959 was unconstitutional.

This Court has approved the invalidation of an apportionment scheme less than ten years old in *Sixty-Seventh Minnesota State Senate v. Beens*, 406 U.S. 187 (1972) (per curiam). The District Court in *Beens* held in 1972 that a 1966 apportionment was unconstitutional. This Court did not specifically address the question of the age of the scheme *or* of the data upon which it was based, but concluded that "judicial relief was appropriate." *Id.* at 195.

In *Whitcomb v. Chavis*, 403 U.S. 124 (1971), this Court rejected the argument that a state cannot be compelled to reapportion its districts more than once in a ten-year period. The scheme had been upheld in 1965, and after development of the law in this area by this Court, the district court held the plan unconstitutional in 1969. The state relied on *Reynolds* for the argument that no reapportionment within ten years could be ordered. The Court held:

> "Such a reading misconstrues the thrust of *Reynolds* in this respect. Decennial reapportionment was suggested as a presumptively rational method to avoid 'daily, monthly, annual or biennial reapportionment' as population shifted throughout the State. Here, the District Court did not order reapportionment as a result of population shifts . . . but only because the disparities among districts which were thought to be permissible at the time of that decision had been shown by intervening decisions of this Court to be excessive." *Whitcomb*, 403 U.S. at 163.

The Court in *Whitcomb* did not discuss the age of the data upon which the districting plan was based.

The court below in the instant case distinguished all the foregoing cases either because the state reapportionment plan was viewed as unconstitutional *ab initio*, or that the underlying data was more than ten years old. The panel concluded that constitutional problems "will arise" in 1989 if the current Kansas plan for reapportionment is implemented and cautioned that "what might happen in 1989 is not before us . . .". *Bacon*, 575 F. Supp. at 766.

Appellants submit that the error of the lower court is clearly demonstrated by actually looking ahead to the year 1989. According to the court, and even the opinion of the Attorney General of Kansas upon which the 1983 legislature relied, any attempt by the legislature to reapportion in 1989 using the 1980 census will be constitutionally suspect. What then will be the relief available?

The state could reverse current state policy and return to the discredited and expensive State of Kansas Agricultural Census. That avenue would be wildly improbable and, we submit, constitutionally suspect.

The state coud proceed to reapportion in 1989 with the 1980 figures (a procedure fraught with constitutional problems in the lower court's mind) and repeat the process a short one or two years later when the 1990 census figures are available, or delay any reapportionment until 1991 when the 1990 census figures are available. In the latter case, the lower court would be sanctioning the use in the 1990 Senate and House of Representatives elections of an irrational apportionment scheme *and* underlying data more than ten years old.

The effect of the lower court's decision is to allow reapportionment in 1989 using the 1980 census, with reapportionment immediately following the 1990 census—*but waiting five years to order it!* During this time two elections will have been conducted using the legislative districts *currently* showing massive deviations. The lower court's conclusion is in no way required or suggested by the opinions of this Court, and leads to irrational results.

II. The Current Kansas Legislative Districting Scheme Contains Impermissibly Large Population Variances and Violates the One Person, One Vote Principle of the Fourteenth Amendment to the United States Constitution.

The court below did not discuss the ultimate question before it—that is, whether the legislative districts in Kansas contained unconstitutional population variances. "For purposes of this case, we assume that both houses of the Kansas legislature are malapportioned if the 1980 federal census must be used." *Bacon*, 575 F. Supp. at 765. Since the three-judge panel held that no reapportionment could be ordered within ten years of the enactment of the scheme, the question of the degree of malapportionment was immaterial. This Court has developed guidelines for state

reapportionment in a line of cases including *Reynolds, Mahan v. Howell*, 410 U.S. 315 (1973), *Gaffney v. Cummings*, 412 U.S. 735 (1973), and *Connor v. Finch*, 431 U.S. 407 (1977).

Justice Brennan concisely summarized the four step test for determining the constitutionality of a state reapportionment plan in his dissenting opinion in *Brown v. Thomson*, ... U.S. ....., 103 S.Ct. 2690, 77 L.Ed. 2d 214, 228 (1983):

> "*First*, a plaintiff must show that the deviations at issue are sufficiently large to make out a prima facie case of discrimination. We have come to establish a rough threshold of 10% maximum deviation from equality . . .
>
> . . .
>
> *Second*, a court must consider the quality of the reasons advanced by the State to explain the deviations . . .
>
> . . .
>
> *Third*, the state must show that 'the state policy urged . . . to justify the divergences . . . is, indeed, furthered by the plan,' . . .
>
> . . .
>
> *Fourth*, even if the state succeeds in showing that the deviations in its plan are justified by their furtherance of a rational state policy, *the court must nevertheless consider whether they are small enough to be constitutionally tolerable.* 'For a State's policy urged in justification of disparity in district population, however rational, cannot constitutionally be permitted to emasculate the goal of substantial population equality.' *Mahan*, 410 U.S., at 326." (Emphasis added).

It is abundantly clear that the stipulated facts and data in this case demonstrate a prima facie case of discrimination. Use of the 1980 federal census, which is now mandated by Kansas law for reapportionment purposes, results in maximum total deviations of 100.41% in the House and 57.9% in the Senate. These figures are far above the 10% threshold tolerated as *de minimis* by this Court. *Connor,* 431 U.S. at 418. While it would appear that these deviations are among those "too great to be justified by any state interest so far suggested," at the very least the deviations are "sufficiently large to require justification" by the state. *Gaffney,* 412 U.S. at 744-45. No such justification has been attempted nor is one possible. The maximum deviations in both the House and Senate districts will exceed 10%. The state has no rational policy to justify the deviations. A state interest in decennial reapportionment is not served by a plan that results in effective reapportionment every 19 years. The plan of reapportionment using nine year old census figures one year before new data will become available does not, indeed, serve the state's interest in decennial reapportionment.

The only real issue remaining is whether the percentage deviations are small enough to be constitutionally tolerable. Appellants submit that maximum total deviations of 57.9% in the Senate and 100.41% in the House of Representatives *must* be considered constitutionally impermissible. In *Mahan,* this Court found that a maximum deviation of 16.4% approached "tolerable limits." 410 U.S. at 329. Statewide deviations three and six times that level far exceed any tolerable limits yet found by the Court.

The state has argued, and the court below held, that notwithstanding the deviations in district population, no reapportionment may be compelled because the state has

provisions to reapportion in 1989. The data to be used in 1989, however, is the very data that currently reflects massive total deviations. The population trends will not be reversed in five years, and the deviations will only be exacerbated. In addition, in 1989, the Court *must* face the constitutional problem of the Kansas reapportionment plan —a problem that both the three-judge panel and the Attorney General of the state have admitted exists. Such a result makes a mockery of the one person, one vote principle of the Constitution and of the rulings of this Court.

Without intervention of the Supreme Court, this case will be cited for the proposition that *Reynolds* established a ten-year safe harbor for state legislative reapportionment if it was correctly done in the first place. *Flateau* in the 2nd Circuit correctly rejected this interpretation, and the instant case is indistinguishable. If the Supreme Court has changed its view of the necessity of (1) constitutionally tolerable minimum population deviations and (2) a rational state policy for periodic reapportionment, then such change should be stated in this case. Otherwise, the holding of the lower court herein should be reversed.

CONCLUSION

For the foregoing reasons, this Court should note probable jurisdiction and set this case for plenary review.

Respectfully submitted,

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APPENDIX

OPINION

(Filed December 21, 1983)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Civil Action No. 83-4233

ROBERT C. BACON, CHARLES BUSSING, MARTHA MASINGTON, LARRY PLAGGERMAN, CLYDE A. TOWNSEND and all persons similarly situated,
Plaintiffs,

v.

JOHN CARLIN, Governor of the State of Kansas, JACK H. BRIER, Secretary of State of the State of Kansas, ROSS O. DOYEN, President of the Kansas Senate, MIKE HAYDEN, Speaker of the Kansas House of Representatives, DAN THIESSEN, Chairman of the Kansas Senate Committee on Legislative and Congressional Apportionment, and EDGAR MOORE, Chairman of the Kansas House Committee on Legislative and Congressional Apportionment,
Defendants.

Norman E. Gaar of Gaar & Bell, Overland Park, Kansas (Kerry Patrick, Overland Park, Kansas, Joseph A. Knopp of Everett, Seaton, Knopp & Thompson, Manhattan, Kansas, and Richard A. Pinaire of Hoover, Schermerhorn, Edwards & Pinaire, Junction City, Kansas, with him on the briefs), for plaintiffs.

Jeffrey S. Southard, Assistant Attorney General (Robert T Stephan, Attorney General, with him on the briefs), Topeka, Kansas, for defendants.

Linda R. Johnson filed an amicus brief for the League of Women Voters of Kansas, Topeka, Kansas.

Before LOGAN, Circuit Judge, O'CONNOR, Chief Judge, and ROGERS, District Judge.

LOGAN, Circuit Judge.

Plaintiffs, five qualified Kansas voters, have brought this suit challenging the constitutionality of the present apportionment scheme of the Kansas Senate and House of Representatives. Defendants are the Governor of Kansas, the Secretary of State, the President of the Senate, the Speaker of the House of Representatives, and the chairmen of the House and Senate Committees on Legislative and Congressional Apportionment. The parties argued the case on stipulated facts before this three-judge panel convened pursuant to 28 U.S.C. § 2284(a).

The Kansas Constitution requires reapportionment of the Senate and the House of Representatives in 1979 and at every tenth year thereafter, but it does not indicate what population figures are to be used for apportionment. *See* Kan. Const. art. 10, § 1. In 1979 the Kansas legislature passed and the Governor approved acts establishing the apportionment scheme presently in effect for both legislative bodies. The scheme was based on the 1978 State of Kansas Agricultural Census. The Kansas Supreme Court upheld the constitutionality of the apportionment acts in *In re Senate Bill No. 220*, 225 Kan. 628, 593

P.2d 1 (1979), and in *In re House Bill No. 2620,* 225 Kan. 827, 595 P.2d 334 (1979).

The agricultural census provided the most recent population figures that were available in 1979. Under current Kansas law, however, the 1978 agricultural census will be the last because in 1978 the Kansas legislature repealed the state agricultural census. 1978 Kan. Sess. Laws ch. 55, § 5. Enacted in its place was Kan. Stat. Ann. § 11-201, which provides that "the most recent population figures available from the United States bureau of the census as certified to the secretary of state by the division of the budget on July 1 of each year shall be used for all purposes in the application of the statutes of this state."

On December 31, 1980, the United States Bureau of the Census officially certified to the President the population figures for Kansas derived from the 1980 federal decennial census. The Kansas legislature has convened in regular sessions since the federal census figures have been available and has adjourned each time without enacting a new apportionment scheme based on the 1980 federal census. The Kansas Attorney General has issued an opinion stating that article 10, section 1, of the Kansas Constitution prohibits the legislature from reapportioning until 1989. Op. Att'y Gen. No. 83-33 (March 16, 1983).

In contending that the apportionment scheme for the Kansas Senate and House of Representatives violates the Equal Protection Clause of the Fourteenth Amendment, plaintiffs do not challenge the constitutionality of the 1979 plan when enacted or its use of 1978 state agricultural census figures. Rather, plaintiffs contend that because the Kansas legislature has discontinued the state agricultural census, Kansas must now rely on federal decennial census data for reapportionment and that because the 1980 census reveals impermissibly large deviations from the

population mean the state legislature must be reapportioned now. If the 1980 Federal decennial census figures were used for purposes of apportionment, the ideal Kansas Senate district would contain 59,106 persons and the ideal Kansas House of Representatives district would contain 18,914 persons. The districts as they currently exist show deviations from these ideal population figures as high as 57.9% for the Senate and 100.41% for the House of Representatives.[1] The different method of counting in the two censuses causes much of this deviation. Unlike the federal census, the state agricultural census excluded aliens, transients, and military personnel stationed in Kansas who had not established residence here; it counted college students in the counties where their parents lived unless they had married or established a residence apart from their parents. *See Winter v. Docking*, 373 F. Supp. 308 (D. Kan. 1974) (three-judge court). Because several cases have expressly held that Kansas may constitutionally establish legislative districts based on the agricultural census rather than the federal census, *e.g., id.; Meeks v. Avery*, 251 F. Supp. 245, 250 (D. Kan. 1966) (three-judge court), defendants argue that the Constitution does not require use of the 1980 federal census figures for reapportionment. *See Burns v. Richardson*, 384 U.S. 73, 91-92 (1966) (Equal Protection Clause does not require the states to use total population figures derived from the federal census, but allows exclusion of aliens, transients and some others).

For purposes of this case, we assume that both houses of the Kansas Legislature are malapportioned if the 1980

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1. Maximum percentage deviation from the population mean has been used for measuring the constitutionality of an apportionment plan. *See, e.g., Abate v. Mundt*, 403 U.S. 182 (1971). The maximum percentage deviation is determined by adding the percentage deviation from the population mean of the most populous district to the percentage deviation of the least populous district.

federal census must be used. The sole question we address is a novel one: whether the Equal Protection Clause may compel reapportionment of state legislative districts when the existing scheme is based on census figures less than ten years old and the scheme when enacted did not contain impermissibly large deviations.

In *Reynolds v. Sims*, 377 U.S. 533 (1964), the Supreme Court announced the fundamental constitutional principle that "an individual's right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living in other parts of the State." *Id.* at 568. Thus, the Constitution requires that "a State make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable." *Id.* at 577. The Court emphasized, however, that the mandate of the Equal Protection Clause "does not mean that States cannot adopt some reasonable plan for periodic revision of their apportionment schemes." *Id.* at 583. The Court then elaborated:

> "*Decennial reapportionment appears to be a rational approach to readjustment of legislative representation* in order to take into account population shifts and growth. . . . Limitations on the frequency of reapportionment are justified by the need for stability and continuity in the organization of the legislative system, although undoubtedly reapportioning no more frequently than every 10 years leads to some imbalance in the population of districts toward the end of the decennial period and also to the development of resistance to change on the part of some incumbent legislators. In substance, we do not regard the Equal Protection Clause as requiring daily, monthly, annual or biennial reapportionment, so long as a State has a

> reasonably conceived plan for periodic readjustment of legislative representation. While we do not intend to indicate that decennial reapportionment is a constitutional requisite, *compliance with such an approach would clearly meet the minimal requirements for maintaining a reasonably current scheme of legislative representation.* And we do not mean to intimate that more frequent reapportionment would not be constitutionally permissible or practicably desirable. But if reapportionment were accomplished with less frequency, it would assuredly be constitutionally suspect."

Id. at 583-84 (emphasis added). Thus, since the existing Kansas apportionment scheme is less than ten years old, *Reynolds* indicates that the Constitution does not compel reapportionment until 1989.

Plaintiffs contend that *Reynolds* does not establish a categorical rule that the Constitution may not compel reapportionment when the existing scheme is less than ten years old. They rely in part on *Whitcomb v. Chavis*, 403 U.S. 124 (1971). In *Whitcomb*, the district court had upheld the constitutionality of the challenged reapportionment scheme in 1965. But in 1969, after subsequent Supreme Court decisions revealed that the scheme had been unconstitutional when enacted, the district court held the same plan unconstitutional. Relying on *Reynolds*, the state argued on appeal that a state cannot be compelled to reapportion its legislative districts more than once in a ten-year period. The Court disagreed, stating:

> "Such a reading misconstrues the thrust of *Reynolds* in this respect. Decennial reaportionment was suggested as a presumptively rational method to avoid 'daily, monthly, annual or biennial reapportionment' as population shifted throughout the State. Here, the District Court did not order reapportionment as a

> result of population shifts . . . but only because the disparities among districts which were thought to be permissible at the time of that decision had been shown by intervening decisions of this Court to be excessive."

403 U.S. at 163 (footnote omitted).

Whitcomb is distinguishable from the instant case; it stands for the proposition that the Constitution may compel reapportionment more than once in a ten-year period if the apportionment scheme was unconstitutional when enacted. Here plaintiffs do not and could not contend that the Kansas apportionment plan now in effect was invalid when enacted.[2] Thus, *Whitcomb* does not indicate that the Equal Protection Clause compels reapportionment in the instant case.

Plaintiffs also rely on several other decisions in contending that the Kansas scheme is unconstitutional. In *Sixty-Seventh Minnesota State Senate v. Beens*, 406 U.S. 187 (1972) (per curiam), the Supreme Court reviewed a 1972 district court holding that a 1966 apportionment was unconstitutional. The 1966 scheme apparently was based on population figures derived from the 1960 decennial census. *See id.* at 188-90 and *Honsey v. Donovan*, 236 F. Supp. 8, 15-16 (D. Minn. 1964) (three-judge court). Although the parties did not raise and the Court did not directly address the relevance of the fact that the existing scheme

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2. Before the 1979 reapportionment scheme was adopted the annual agricultural census had been eliminated and Kan. Stat. Ann. § 11-201, referencing the federal census for state statutes, had been enacted. But no argument could be made that § 11-201 in combination with the Kansas constitutional provision required apportionment based on the latest available federal census figures—then 1970. The 1979 reapportionment was by specific legislative enactments relying upon 1978 figures, the latest available, from a census of the type Kansas courts previously approved for reapportionment use.

was only six years old, the Court found that "judicial relief was appropriate" under the circumstances. 406 U.S. at 195. In *Flateau v. Anderson*, 537 F. Supp. 257 (S.D.N.Y. 1982), *appeal dismissed*, 103 Sup. Ct. 5 (1983), the court upheld a 1982 challenge to a redistricting plan last amended in 1974 and based upon 1970 federal census figures. In *Farnum v. Burns*, 548 F. Supp. 769 (D.R.I. 1982) (three-judge court), the court declared invalid in 1982 an apportionment scheme enacted in 1974 and based on 1970 federal census data. The court, relying on *Whitcomb* and *Beens*, concluded that "a state can constitutionally be compelled to reapportion in time for the first election after a census, even where the existing reapportionment scheme is less than ten years old." *Id.* at 773.

Finally, in *Honsey v. Donovan*, 236 F. Supp. 8 (D. Minn. 1964) (three-judge court) (opinion by Blackmun, Circuit Judge), cited in the amicus brief, the court held in 1964 that an apportionment plan enacted in 1959 was unconstitutional. The 1959 scheme was based on updated 1950 census figures.

All these cases are both consistent with *Reynolds* and distinguishable from the case at bar. What they tell us is that in 1989, if the Kansas legislature attempts to implement its constitutional provision requiring reapportionment by reliance upon 1980 federal census figures or those figures updated by estimates, constitutional problems will arise. But what might happen in 1989 is not before us; we are reviewing a scheme enacted into law in 1979 and currently in use. The accuracy of an apportionment scheme at any given time depends as much on the age of the data as the age of the scheme. In *Beens*, *Flateau*, *Farnum*, and *Honsey* the apportionment schemes declared unconstitutional were based on census figures over ten years old. Realistically, then, those plans were not the

sort of "decennial reapportionment" schemes that the Court indicated "would clearly meet the minimal requirements for maintaining a reasonably current scheme of legislative representation." *Reynolds*, 377 U.S. at 583-84. In the instant case, on the other hand, the reapportionment scheme is only four years old and is based on census figures only five years old. We therefore conclude that Kansas is not constitutionally compelled to reapportion its legislature at this time. Accordingly, we hold for defendants.

/s/ JAMES K. LOGAN
U. S. Circuit Judge, 10th Circuit
/s/ EARL E. O'CONNOR
Chief Judge
For the District of Kansas
/s/ RICHARD D. ROGERS
Judge, U. S. District Court
For the District of Kansas

(Filed January 20, 1984)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Civil Action No. 83-4233

ROBERT C. BACON, CHARLES BUSSING, MARTHA MASINGTON, LARRY PLAGGERMAN, CLYDE A. TOWNSEND and all persons similarly situated,
Plaintiffs,

vs.

JOHN CARLIN, Governor of the State of Kansas, JACK H. BRIER, Secretary of State of the State of Kansas, ROSS O. DOYEN, President of the Kansas Senate, MIKE HAYDEN, Speaker of the Kansas House of Representatives, DAN THIESSEN, Chairman of the Kansas Senate Committee on Legislative and Congressional Apportionment, and EDGAR MOORE, Chairman of the Kansas House Committee on Legislative and Congressional Apportionment,
Defendants.

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that the above-named Plaintiffs Bacon, Bussing, Masington, Plaggerman, and Townsend, on behalf of themselves and all persons similarly situated, hereby appeal to the United States Supreme Court from the Judgment on Decision entered December 21, 1983, by a three-judge panel in the United States District Court for the District of Kansas, denying the Plaintiffs' prayer for injunctive relief and granting judgment to the Defendants in this matter. The three-judge panel was convened pursuant to 28 U.S.C. §2284(a). In its decision, the court held that Kansas was not constitutionally

compelled to reapportion its state legislative districts at this time. This appeal is taken pursuant to 28 U.S.C. §1253.

Respectfully submitted,

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Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

The undersigned, counsel of record for appellants, and an attorney admitted to the bar of the Supreme Court of the United States, hereby certifies that copies of the foregoing Notice of Appeal were served by depositing same in the United States Mail, first class postage prepaid, the 20th day of January, 1984, to: ROBERT T. STEPHAN, Attorney General of the State of Kansas, and JEFFREY S. SOUTHARD, Assistant Attorney General, counsel of record for all Defendants, at the following address: Office of the Attorney General of the State of Kansas, Kansas Judicial Center, 2nd Floor, Topeka, Kansas, 66612.

/s/ Norman E. Gaar
Norman E. Gaar, Esq.

EXHIBIT E

Kansas Legislative Research Department

December 20, 1982

KANSAS SENATE DISTRICTS

(1980 U.S. Census Data)

District	1980 Population	Deviation
1	57,445	-2.8%
2	61,464	+4.0
3	63,835	+8.0
4, 5, 6	172,335 ÷ 3= 57,445	-2.8
7, 8, 9, 10	253,555* ÷ 4= 63,389	+7.2
11	64,804*	+9.6
12	59,785	+1.2
13	58,999	-0.2
14	60,606	+2.5
15	57,750	-2.3
16	60,080	+1.7
17	56,253	-4.8
18, 19, 20	154,916 ÷ 3= 51,639	-12.6

District	1980 Population	Deviation
21	59,709*	+1.0
22	84,869*	+43.6
23	53,574	-9.4
24	59,690	+1.0
25	60,184	+1.8
26	63,155	+6.9
27 28 29 30 31	306,536 ÷5= 61,307	+3.7
32	59,024	-0.1
33	55,586	-6.0
34	56,720	-4.0
35	52,111	-11.8
36	53,934	-8.8
37	56,354	-4.7
38	56,184	-4.9
39	50,666	-14.3
40	54,113	-8.5

State Total: 2,364,236

"Ideal": 59,106

* Population of some precincts in this district has been extrapolated.

EXHIBIT F

Kansas Legislative Research Department

March 7, 1983
Revised October 4, 1983

KANSAS HOUSE DISTRICTS

(1980 U.S. Census Data)

District	1980 Population	Deviation
1	17,895	-5.39
2	18,459*	-2.41
3	17,489*	-7.53
4	19,035*	+0.64
5	18,967	+0.28
6	18,672	-1.28
7	17,472*	-7.62
8	17,769	-6.05
9	17,624	-6.82
10	18,183	-3.86
11	18,089	-4.36
12	19,739	+4.36
13	19,501	+3.10
14	20,100	+6.27
15	18,519	-2.09
16	18,215	-3.70
17	19,098	+0.97
18		
19		
20		
21		
22		
23	259,107	
24	÷13=	+5.38
25	19,931	
26		
27		
28		
29		
30		

District	1980 Population	Deviation
31		
32		
33		
34	158,946*	
35	÷9=	-6.63
36	17,660	
37		
38		
39		
40	19,728*	+4.30
41	15,782*	-16.60
42	26,611*	+40.70
43	20,513*	+8.45
44	21,753*	+15.01
45	18,810*	-0.55
46	17,726*	-6.28
47	20,268	+7.16
48	17,791	-5.94
49	17,422	-7.89
50	18,833	-0.43
51		
52		
53		
54	143,899	
55	÷9=	-15.47
56	15,989	
57		
58		
59		
60	17,718	-6.32
61	20,067	+6.10
62	17,421	-7.89

District	1980 Population	Deviation
63	16,897	-10.66
64	24,656	+30.36
65	19,305	+2.07
66	34,165	+80.63
67	25,898	+36.93
68	17,900	-5.36
69	18,709	-1.08
70	16,831	-11.01
71	18,493	-2.23
72	19,513	+3.17
73	19,503	+3.11
74	18,439	-2.51
75	18,758	-0.83
76	18,833	-0.43
77	19,543	+3.33
78	21,048	+11.28
79	19,677	+4.03
80	18,305	-3.22
81		
82		
83		
84		
85		
86		
87		
88	372,243	
89	÷18=	+9.34
90	20,680	
91		
92		
93		
94		
95		
96		
97		
98		
99	18,940	+0.14

District	1980 Population	Deviation
100	17,864	-5.55
101	17,853	-5.61
102	18,284	-3.33
103	16,996	-10.14
104	18,740	-0.92
105	19,178	+1.40
106	17,328	-8.39
107	16,759	-11.39
108	18,369	-2.88
109	17,147	-9.34
110	18,667*	-1.31
111	18,827*	-0.46
112	16,170	-14.51
113	15,173	-19.78
114	18,030	-4.67
115	17,417	-7.92
116	18,885	-0.15
117	15,214	-19.62
118	18,073	-4.45
119	18,475	-2.32
120	17,134	-9.41
121	18,255	-3.48
122	16,617	-12.14
123	16,469	-12.93
124	19,047	+0.70
125	18,388	-2.78

State Total: 2,364,236

"Ideal": 18,914

* Population of some precincts in this district has been extrapolated.

(Filed October 21, 1983)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Civil Action No. 83-4233

ROBERT C. BACON, CHARLES BUSSING, MARTHA MASINGTON, LARRY PLAGGERMAN, CLYDE A. TOWNSEND and all persons similarly situated,
Plaintiffs,

vs.

JOHN CARLIN, Governor of the State of Kansas, JACK H. BRIER, Secretary of State of the State of Kansas, ROSS O. DOYEN, President of the Kansas Senate, MIKE HAYDEN, Speaker of the Kansas House of Representatives, DAN THIESSEN, Chairman of the Kansas Senate Committee on Legislative and Congressional Apportionment, and EDGAR MOORE, Chairman of the Kansas House Committee on Legislative and Congressional Apportionment,
Defendants.

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

COME NOW the Plaintiffs and move the court pursuant to Federal Rule of Civil Procedure 56 for an order granting summary judgment in favor of Plaintiffs and against Defendants on the ground that there are no genuine issues of disputed material fact and that Plaintiffs are entitled to judgment as a matter of law declaring the present Kansas Senate and House of Representatives districts malapportioned and thus unconstitutional, the existing Kansas reapportionment scheme unconstitutional and for such other and further relief as the court may deem

just and proper. In support, Plaintiffs submit their Response to Defendants' Motion to Dismiss and Suggestions in Support of Plaintiffs' Motion for Summary Judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Motion for Summary Judgment was served by depositing same in the United States Mail, first class postage prepaid, the 21st day of October, 1983, to: ROBERT T. STEPHAN and JEFFREY S. SOUTHARD, Kansas Judicial Center, 2nd Floor, Topeka, Kansas, 66612, Attorneys for Defendants.

/s/ Norman E. Gaar
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